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COURT OF CRIMINAL APPEALS
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In the Court of Criminal Appeals of Texas

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COURT OF CRIMINAL APPEALS
3/19/2021
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No. 14-20-00548-CR
In the Court of Appeals for the
Fourteenth District of Texas at Houston

No. 2309523
In the County Criminal Court at Law No. 8 of Harris County, Texas

THE STATE OF TEXAS
Appellant

V.

LEONARDO FABIO GARCIA
Appellee

STATE'S PETITION FOR DISCRETIONARY REVIEW

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ORAL ARGUMENT IS NOT REQUESTED

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IDENTITY OF THE JUDGE, PARTIES, AND COUNSEL

Pursuant to Texas Rule of Appellate Procedure 38.2(a)(1)(A), a complete list of the names and addresses of all attorneys, and the names of all interested persons, is provided below so that the members of this Honorable Court may at once determine whether they are disqualified to serve or whether they should recuse themselves from participating in the decision of the case.

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Trial Judges:

The Honorable Franklin Bynum—Presiding Judge of the County Criminal Court at Law Number 8 of Harris County, Texas, for Appellee's habeas corpus proceeding

The Honorable Jay Karahan—Presiding Judge of the County Criminal Court at Law Number 8 of Harris County, Texas, for Appellee's underlying criminal case

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TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS OF TEXAS:

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Texas Rule of Appellate Procedure 68.4(c), the State does not request oral argument because the undersigned attorney believes that it would not assist this Court in resolving any legal or factual matter presented in this case. *See generally* TEX. R. APP. P. 68.4(c).

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STATEMENT OF THE CASE

In trial court cause number 1413575, the Stated charged Appellee by information with the Class B misdemeanor offense of theft by check of property valued at $20 or more but less than $500, committed on or about November 11, 2004. (CR – 35);[1] *see* TEX. PENAL CODE ANN. § 31.03(e)(2)(A)(ii) (Vernon 2004); *see also* TEX. PENAL CODE ANN. § 31.06 (Vernon 2004). On May 15, 2007, pursuant to a plea bargain agreement between the State and Appellee, Appellee pled guilty to the offense as charged and the State recommended that the trial court sentence Appellee to confinement in the Harris County Jail for 10 days, with credit for the 3 days that Appellee had already served in jail. (CR – 35). On May 15, 2007, the trial court accepted the parties' plea agreement; accepted Appellee's

[1] The clerk's record consists of one volume, which will be referenced as (CR – [page number]). The court reporter's record consists of one volume from the hearing on Appellee's habeas corpus application, held on June 26, 2020, which will be referenced as (RR – [page number]). The State's Exhibit admitted at the hearing will be cited as (SX 1).

guilty plea; found Appellee guilty as charged; found that Appellee was entering his plea freely and voluntarily, and that Appellee was aware of the consequences of his plea; and sentenced Appellee to confinement in the Harris County Jail for 10 days, with credit for 3 days previously served. (CR – 35-36). Appellee did not appeal this conviction.

On May 1, 2020, in trial court cause number 2309523, pursuant to Article 11.09 of the Texas Code of Criminal Procedure, Appellee filed in the trial court an application for a writ of habeas corpus seeking to collaterally attack Appellee's conviction in cause number 1413575 on the grounds that Appellee's guilty plea was involuntary due to ineffective assistance of counsel.[2] (CR – 5-8); *see generally* TEX. CODE CRIM. PROC. ANN. art. 11.09. The State filed an answer to Appellee's habeas corpus application on June 13, 2020. (CR – 21-37). Appellee filed a response to the State's answer on June 16, 2020, and requested a hearing. (CR – 38-46). On June 18, 2020, the trial court set the case for a hearing on June 26, 2020. (CR – 47). On June 26, 2020, trial court held the hearing, during which Appellee testified and the State proffered the affidavit of Juan Aguirre, Appellee's

[2] Appellee's application for a writ of habeas corpus also collaterally attacked another of Appellee's prior convictions for misdemeanor theft, for which a different trial court entered an order placing Appellee on deferred adjudication community supervision on November 19, 1998. *See* (CR – 5-8); *see also* (CR – 45) (showing that the County Criminal Court at Law Number 9 of Harris County, Texas, entered Appellee's 1998 order of deferred adjudication community supervision). The trial court's ruling and order regarding Appellee's habeas corpus application does not address or grant relief from Appellee's 1998 conviction, however, given that that conviction occurred in a different trial court. *See* (CR – 48) (granting habeas corpus relief only as to the trial court's judgment in cause number 1413575, entered May 15, 2007).

counsel for the plea proceedings in cause number 1413575. *See generally* (RR 3-39). On July 14, 2020, the trial court granted Appellee's request for habeas corpus relief, ordered that the trial court's prior judgment of conviction and sentence in cause number 1413575 be vacated, and also ordered that Appellee be "discharged and released without delay." (CR – 48). On July 30, 2020, the State timely filed written notice of appeal to challenge the trial court's ruling granting habeas corpus relief. (CR – 54-56).

On March 2, 2021, the Fourteenth Court of Appeals of Houston issued a published opinion concluding that the State had no right to appeal the trial court's order granting relief on Appellee's Article 11.09 habeas corpus application because: (1) Article 44.01 of the Texas Code of Criminal Procedure does not explicitly authorize the State to appeal such an order; and (2) the trial court's order vacated the court's 2007 judgment and "discharged" Appellee, rather than granting a new trial, or modifying or arresting the court's judgment, and thus the order does not otherwise qualify as an appealable order under Article 44.01(a). *See State v. Garcia*, No. 14-20-00548-CR, 2021 WL 786746, at *2-4 (Tex. App.—Houston [14th Dist.] Mar. 2, 2021, pet. filed). Accordingly, the Fourteenth Court of Appeals dismissed the State's appeal for want of jurisdiction. *Id*. at *4.

STATEMENT OF PROCEDURAL HISTORY

On September 24, 2020, the Fourteenth Court of Appeals issued a published opinion concluding that the State had no right to appeal the trial court's order granting relief on Appellee's Article 11.09 habeas corpus application because: (1) Article 44.01 of the Texas Code of Criminal Procedure does not explicitly authorize the State to appeal such an order; and (2) the trial court's order vacated the court's 2007 judgment and "discharged" Appellee, rather than granting a new trial, or modifying or arresting the court's judgment, and thus the order does not otherwise qualify as an appealable order under Article 44.01(a). *See Garcia*, 2021 WL 786746, at *2-4; *see also* (App'x). Accordingly, the Fourteenth Court of Appeals dismissed the State's appeal for want of jurisdiction. *Id*. at *4.

The State did not file a motion for rehearing or a motion for *en banc* reconsideration by the Fourteenth Court of Appeals. Rather, in accordance with Texas Rule of Appellate Procedure 68.2(a), the State now timely files this Petition for Discretionary Review within thirty days of the date that the Fourteenth Court of Appeals rendered its opinion. *See* TEX. R. APP. P. 68.2(a).

———————♦———————

STATEMENT OF FACTS

Appellee, a native and citizen of Honduras, was born in Honduras on June 6, 1991. (RR – 10); *see* (CR – 45). Appellee immigrated to the United States with

his family when he was approximately 3 years old, and his immigration status was adjusted to that of a lawful permanent resident on December 6, 1995. *See* (CR – 45).

On November 11, 2004, Appellee was arrested and charged with the Class B misdemeanor offense of theft by check of property valued at $20 or more but less than $500. (CR – 35); *see* TEX. PENAL CODE ANN. § 31.03(e)(2)(A)(ii) (Vernon 2004); *see also* TEX. PENAL CODE ANN. § 31.06 (Vernon 2004). The case was filed in County Criminal Court at Law Number 8 of Harris County, Texas, under cause number 1413575. *See* (CR – 35). On May 15, 2007, criminal defense attorney Juan J. Aguirre was serving as "Attorney of the Week" in County Criminal Court at Law Number 8 and was appointed to represent Appellee in cause number 1413575. *See* (SX 1). On May 15, 2007, Appellee and the State reached a plea bargain agreement whereby Appellee agreed to plead guilty to the offense as charged and the State agreed to recommend to the trial court that the court sentence Appellee to confinement in the Harris County Jail for 10 days, with credit for the 3 days that Appellee had already served in jail. (CR – 35); *see* (SX 1). On May 15, 2007, the trial court accepted the parties' plea agreement; accepted Appellee's guilty plea; found Appellee guilty as charged; found that Appellee was entering his plea freely and voluntarily, and that Appellee was aware of the consequences of his plea; and sentenced Appellee to confinement in the Harris County Jail for 10 days,

with credit for the 3 days that Appellee previously served. (CR – 35-36, 45). Appellee did not appeal this conviction.

On November 26, 2019, the United States Department of Homeland Security served Appellee with a Notice to Appear for removal proceedings, asserting that Appellee is removable from the United States because, pursuant to Section 237(a)(2)(A)(ii) of the Immigration and Nationality Act, after being admitted to the United States, Appellee "ha[s] been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct."[3] (CR – 44-46); *see* 8 U.S.C. § 1227(a)(2)(A)(ii) (providing that "[a]ny alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct,…is deportable.").

On May 1, 2020, nearly 13 years after Appellee's conviction in cause number 1413575 became final, Appellee filed in the trial court an application for a writ of habeas corpus pursuant to Article 11.09 of the Texas Code of Criminal Procedure, seeking to collaterally attack Appellee's conviction in cause number 1413575. (CR – 5-8); *see generally* TEX. CODE CRIM. PROC. ANN. art. 11.09 (pertaining to applications for writs of habeas corpus seeking relief in misdemeanor cases). Specifically, Appellee alleged that his guilty plea in cause

[3] The Notice to Appear cited Appellee's 1998 order of deferred adjudication for misdemeanor theft and Appellee's 2007 conviction for misdemeanor theft as Appellee's removable offenses. *See* (CR – 45).

number 1413575 was involuntary due to ineffective assistance of counsel because his defense attorney "failed to advise [Appellee] of the severe immigration consequences before he entered a plea of guilty[,]" in violation of *Padilla v. Kentucky*, 559 U.S. 356 (2010). (CR – 5-8).

On June 26, 2020, trial court held the hearing concerning the merits of Appellee's habeas corpus application and then took the matter under advisement. *See* (RR – 30-32). On July 14, 2020, the trial court issued an order granting Appellee's request for habeas corpus relief, vacating the trial court's prior judgment of conviction and sentence in cause number 1413575, and ordering that Appellee be "discharged and released without delay." (CR – 48). The trial court did not enter any findings of fact or conclusions of law regarding the basis for the court's ruling. *See generally* (CR – 68).

GROUND FOR REVIEW

The Fourteenth Court of Appeals misconstrued Article 44.01 of the Texas Code of Criminal Procedure and erred in concluding that the State does not have the right to appeal the trial court's order granting relief in a habeas corpus proceeding brought under Article 11.09 of the Texas Code of Criminal Procedure when the trial court's order functionally served to either grant a new trial or to dismiss the information—both of which would constitute an appealable order under Article 44.01(a).

REASONS FOR GRANTING REVIEW

The Court should grant this Petition for Discretionary Review pursuant to Texas Rules of Appellate Procedure 66.3(a), (b), (c), (d), and (f) because: the decision of the Fourteenth Court of Appeals conflicts with an opinion by another court of appeals on the same issue; the Fourteenth Court of Appeals has decided an important question of state law that has not been, but should be, settled by this Court; the Fourteenth Court of Appeals has decided an important question of state law in a way that conflicts with the applicable decisions of this Court; and the Fourteenth Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call upon this Court to exercise this Court's power of supervision. *See generally* TEX. R. APP. P. 66.3(a); TEX. R. APP. P. 66.3(b); TEX. R. APP. P. 66.3(c); TEX. R. APP. P. 66.3(d); TEX. R. APP. P. 66.3(f).

ARGUMENT FOR THE STATE'S SOLE GROUND FOR REVIEW

The Fourteenth Court of Appeals misconstrued Article 44.01 of the Texas Code of Criminal Procedure and erred in concluding that the State does not have the right to appeal the trial court's order granting relief in a habeas corpus proceeding brought under Article 11.09 of the Texas Code of Criminal Procedure when the trial court's order functionally served to either grant a new trial or to dismiss the information—both of which would constitute an appealable order under Article 44.01(a).

I. The State is permitted to appeal a trial court's habeas corpus order when Article 44.01 specifically authorizes the appeal, or when the order results in a situation in which the State could otherwise appeal, per Article 44.01(a)

Article 44.01 of the Texas Code of Criminal Procedure provides the circumstances under which the State may appeal in a criminal case. *See* TEX. CODE CRIM. PROC. ANN. art. 44.01. Article 44.01(k) specifically entitles the State "to appeal an order granting relief to an applicant for a writ of habeas corpus under Article 11.072[,]" but neither Subsection (k) nor any other provision in Article 44.01 explicitly provides the State the right to appeal an order granting relief to a habeas corpus applicant in proceedings brought under Article 11.09. *See* TEX. CODE CRIM. PROC. ANN. art. 44.01(k); *see generally* TEX. CODE CRIM. PROC. ANN. art. 44.01.

However, the fact that Article 44.01 does not explicitly mention Article 11.09 does not preclude the State from appealing a trial court's Article 11.09 order because this Court has made clear that the State may appeal a trial court's order

granting habeas corpus relief when the order functionally creates one of the appealable scenarios that Article 44.01 does specifically enumerate. *See Alvarez v. Eighth Court of Appeals of Texas*, 977 S.W.2d 590, 593 (Tex. Crim. App. 1998) ("We hold that if the granting of relief by a habeas corpus court results in one of the enumerated situations within Art. 44.01(a), the State may appeal regardless of what label is used to denominate the proceeding which results in the order being entered."); *State v. Young*, 810 S.W.2d 221, 222-23 (Tex. Crim. App. 1991) (finding the appellate court had jurisdiction and holding that the State could appeal an order granting habeas corpus relief which had the effect of dismissing the indictments pending against the appellees because, per Article 44.01(a)(1), the State is entitled to appeal order which dismisses an indictment); *contra State ex rel. Holmes v. Klevenhagen*, 819 S.W.2d 539 (Tex. Crim. App. 1991) (holding that the State could not appeal an order granting habeas corpus relief and barring extradition to Louisiana because Article 44.01 does not authorize the State to appeal an order related to extradition).

Following this Court's lead, other Texas courts of appeals have determined that the State is permitted to appeal an order granting habeas corpus relief when the order is functionally equivalent to an order that is otherwise appealable under Article 44.01(a). *See State v. Garcia*, No. 13-11-00689-CR, 2012 WL 7849303, at *3-4 (Tex. App.—Corpus Christi-Edinburg Dec. 13, 2012, no pet.) (mem. op., not

designated for publication) (finding the appellate court had jurisdiction and holding that the State could appeal an order granting habeas corpus relief under Article 11.09 because the order was tantamount to an order granting a new trial, which the State may normally appeal under Article 44.01(a)(3)); *Ex parte Crenshaw*, 25 S.W.3d 761, 764 n.4 (Tex. App.—Houston [1st Dist.] 2000, pet. ref'd) (observing that the State may appeal an order granting habeas corpus relief when the order is equivalent to an order that sustains a claim of former jeopardy, given that the State may normally appeal such an order under Article 44.01(a)(4)); *State v. Kanapa*, 778 S.W.2d 592, 593-94 (Tex. App.—Houston [1st Dist.] 1989, no pet.) (finding that the appellate court had jurisdiction and holding that the State could appeal an order granting habeas corpus relief and modifying the previous judgment entered against the appellee in a misdemeanor DWI case, given that Article 44.01(a)(2) allows the State to appeal an order modifying a judgment).

II. The Legislature's addition of Subsection (k) to Article 44.01 does not diminish the State's right of appeal under Subsection (a)

In 2003, the Texas Legislature passed a bill which simultaneously created Article 11.072 (to allow habeas corpus proceedings in community supervision cases) and added subsection (k) to Article 44.01 (to allow the State to appeal orders granting habeas corpus relief in proceedings brought under Article 11.072). *See* ACT OF JUNE 20, 2003, 78TH LEG., R.S., CH. 587, 2003 TEX. SESS. LAW SERV. CH. 587 (H.B. 1713) (adding Article 11.072 and Article 44.01(k) to the Texas Code of

Criminal Procedure). In this case, the Fourteenth Court of Appeals reasoned that the Legislature added Subsection (k) to "single out grants of 11.072 habeas-corpus relief when granting the State the right to appeal[,]" and supposes that the Legislature's failure to also add Article 11.09 to Article 44.01's list of appealable orders must mean that the Legislature intended to deprive the State the right to appeal grants of habeas corpus relief under that provision. *See Garcia*, 2021 WL 786746, at *3. The appellate court's assessment places undue emphasis on the Legislature's addition of Subsection (k), though, because nothing in the bill creating that subsection evinces any intent by the Legislature to restrict the State's right of appeal under other, pre-existing portions of Article 44.01, such as Subsection (a). *See* HOUSE COMM. CRIM. JURIS., BILL ANALYSIS, TEX. H.B. 1713, 78TH LEG., R.S. (2003) (explaining that "[this bill] also would amend Code of Criminal Procedure, art. 44.01, to clarify that the state is entitled to appeal an order granting relief to an applicant for a writ of habeas corpus under art. 11.072[,]" but not stating that the addition of Subsection (k) was intended to restrict the applicability of any other subsection of Article 44.01). Hence, because the bill appears to have been meant only to clarify that the State has the right to appeal orders granting Article 11.072 habeas corpus relief, Article 44.01(k) should not be interpreted to restrict the application of other portions of Article 44.01. *See* TEX. GOV'T CODE ANN. § 311.031(a)(1) (establishing that "the reenactment, revision,

amendment, or repeal of a statute does not affect…the prior operation of the statute or any prior action taken under it[.]").

The Legislature's addition of Subsection (k) was necessary because some orders granting relief under Article 11.072 could pertain only to the conditions of the applicant's community supervision—orders which would not otherwise be appealable under Article 44.01—rather than affecting the judgment, itself. *See* TEX. CODE CRIM. PROC. ANN. art. 11.072, § 2(b)(2) (permitting an applicant seeking habeas corpus relief to challenge the legal validity of "the conditions of community supervision" which allegedly restrain the applicant, independently of a challenge to a judgment of conviction or order imposing community supervision). Thus, while Subsection (k) creates some redundancy with Subsection (a)—which would already have permitted the State to appeal an order granting Article 11.072 relief which vacated a judgment and remanded for a new trial, dismissed the charging instrument, sustained a claim of double jeopardy, etc.—Subsection (k) also expands the State's right of appeal in the specific circumstances envisioned by Article 11.072 where a habeas-corpus applicant attains an order of relief related to the conditions of his community supervision, only. Again, though, absent some explicit sign that the Legislature intended Subsection (k) to act as an implicit constriction on other portions of Article 44.01, or Article 44.01(a), specifically, the

Fourteenth Court of Appeals erred in concluding that Subsection (k) operates in such a way.

III. The Thirteenth Court of Appeals has held that the State may appeal an order granting relief in an Article 11.09 habeas corpus proceeding

In *State v. Garcia*, No. 13-11-00689-CR, 2012 WL 7849303 (Tex. App.—Corpus Christi-Edinburg Dec. 13, 2012, no pet.) (mem. op., not designated for publication), the Thirteenth Court of Appeals of Corpus Christi-Edinburg addressed the State's right to appeal an order granting relief in an Article 11.09 habeas corpus proceeding in a very similar scenario as occurred in Appellee's case. *See Garcia*, 2012 WL 7849303, at *3-4. In *Garcia*, the trial court granted the appellee's Article 11.09 application for a writ of habeas corpus which alleged that the appellee's guilty plea to the Class B misdemeanor offense of possession of marijuana was unknowingly and involuntarily entered because the appellee did not understand the immigration consequences of his plea. *Garcia*, 2012 WL 7849303, at *1. The State appealed the order and, as a threshold matter, the Thirteenth Court of Appeals addressed whether the appellate court had jurisdiction over the appeal, given that Article 44.01 does not explicitly authorize the State to appeal an order granting relief on an application for a writ of habeas corpus brought under Article 11.09. *Garcia*, 2012 WL 7849303, at *3. The appellate court concluded that, despite that Article 44.01 does not specifically permit the State to appeal an order granting Article 11.09 habeas corpus relief, the trial court's order granting such

relief was tantamount to an order granting a new trial—which the State is explicitly permitted to appeal, per Article 44.01(a)(3)—and, thus the appellate court had jurisdiction over the appeal:

> In other words, the habeas court's order in this case had the effect of setting aside the guilty verdict and ordering a rehearing in Garcia's marihuana possession case. Because this ruling is the functional equivalent of an order granting a new trial, the State is permitted to appeal this ruling, no matter the label used in the trial court's order. We therefore conclude that we have jurisdiction over the State's appeal in this case.

Garcia, 2012 WL 7849303, at *3-4.

IV. The opinion by the Fourteenth Court of Appeals in this case directly conflicts with the opinion by the Thirteenth Court of Appeals in *Garcia*

In its opinion, the Fourteenth Court of Appeals did not disagree with the Thirteenth Court of Appeals' reasoning or conclusion in *Garcia* that the State could appeal the court's order granting relief in an Article 11.09 habeas corpus proceeding in that case. *See Garcia*, 2021 WL 786746, at *3. However, the Fourteenth Court of Appeals declined to follow *Garcia* because the appellate court found that, unlike in *Garcia*, the trial court's order in Appellee's case did not grant a new trial, but rather "vacated the conviction and discharged [A]ppellee." *Garcia*, 2021 WL 786746, at *3. But because the nature of the Article 11.09 order in *Garcia* was the same as the trial court's order in Appellee's case—i.e., it vacated the court's judgment of conviction and ordered a new trial, regardless of the terminology used—the Fourteenth Court of Appeals' decision reaching a contrary

conclusion as to the State's right of appeal here brings the appellate courts' holdings into direct conflict.[4]

V. The Fourteenth Court of Appeals misconstrued the "discharge" language of the trial court's order to mean "dismissal," when the only appropriate relief was to remand for a new trial; thus, the trial court's order was appealable under Article 44.01(a)(3)

The writ of habeas corpus is a remedy to be used by a person restrained in his liberty to test the legality of his custody or restraint. *See* TEX. CODE CRIM. PROC. ANN. art. 11.01. A person is "restrained," for purposes of habeas corpus, if the person is actually confined or is subject to the general authority and power of a person claiming the right to exercise control over the person. *See* TEX. CODE CRIM. PROC. ANN. art. 11.22. If the court considering a person's application for a writ of habeas corpus determines that there is no legal cause for the person's imprisonment or restraint, or that a legal cause once existed but no longer exists, the court shall order that the person be discharged. *See* TEX. CODE CRIM. PROC. ANN. art. 11.40.

Notably, though, "discharge" in this sense means that the habeas corpus applicant is discharged from the circumstances of his restraint or imprisonment; it does not mean, as the Fourteenth Court of Appeals surmises in its opinion, that the

[4] Adding to the circuit split, prior to the Thirteenth Court of Appeals' 2012 opinion in *Garcia*, the Eighth Court of Appeals of El Paso found in a mandamus proceeding that "Texas Code of Criminal Procedure 44.01 does not authorize a State's appeal from a writ of habeas corpus" in a case involving an Article 11.09 habeas corpus proceeding. *See In re The State of Texas*, No. 08-09-00181-CR, 2010 WL 335630, at *1 (Tex. App.—El Paso Jan. 29, 2010, no pet.) (not designated for publication).

proceedings and charging instrument against the applicant are entirely dismissed. Specifically, in the context of claims of ineffective assistance of counsel raised through the habeas corpus process, as occurred in this case, this Court has long-established precedent that that the appropriate relief upon sustaining the habeas corpus applicant's claim is to vacate the judgment that imposes the restraint or confinement and remand the case to the trial court for a new trial—returning the parties to their original positions before the deficient representation. *See, e.g., Ex parte Overton*, 444 S.W.3d 632, 641 (Tex. Crim. App. 2014) (granting habeas corpus relief on the grounds of ineffective assistance of counsel and ordering, as a remedy, that the applicant's conviction be reversed and the case be "remanded…to the trial court for a new trial."); *Ex parte Bryant*, 448 S.W.3d 29, 45 (Tex. Crim. App. 2014) (granting habeas corpus relief on the grounds of ineffective assistance of counsel, finding that the applicant was "entitled to a new trial[,]" and ordering that the applicant be remanded to the custody of the county sheriff); *Ex parte Briggs*, 187 S.W.3d 458, 470 (Tex. Crim. App. 2005) (granting habeas corpus relief and ordering, as a remedy, that the complained-of judgment be vacated and the applicant be "remanded to the custody of the Sheriff of Harris County to answer to the indictment"—i.e., that the applicant receive a new trial on the indictment); *Ex parte Moody*, 991 S.W.2d 856, 859 (Tex. Crim. App. 1999) (granting habeas corpus relief on the grounds of ineffective assistance of counsel in

a plea setting and, as relief, setting aside the trial court's judgment and remanding the case for the applicant "to answer the charges against him."); *Ex parte Wilson*, 724 S.W.2d 72, 74-75 (Tex. Crim. App. 1987) (granting habeas corpus relief upon sustaining a claim of ineffective assistance of counsel in a plea setting and, as relief, vacating the judgment of conviction and remanding the case for a new trial).

Accordingly, the Fourteenth Court of Appeals erroneously deemed the trial court's order "discharging" Appellee to be a dismissal of the proceedings and information against Appellee, rather than an order vacating the judgment that served to "restrain" Appellee and granting a new trial. As such, like in *Garcia*, because the trial court's order granting Appellee's request for Article 11.09 habeas corpus relief, vacating the trial court's judgment in cause number 1413575, and discharging Appellee from the restraint of that conviction was the functional equivalent to an order granting a new trial, the State was authorized to appeal the court's order under Article 44.01(a)(3). *See* TEX. CODE CRIM. PROC. ANN. art. 44.01(a)(3); *Garcia*, 2012 WL 7849303, at *3-4.

VI. Even if the trial court's order "discharging" Appellee actually dismissed the information, it would still be an appealable order under Article 44.01(a)(1)

By its plain text, Article 44.01(a)(1) unambiguously permits the State to appeal an order in a criminal case which "dismisses an indictment, information, or complaint[,] or any portion of an indictment, information, or complaint[.]" TEX.

CODE CRIM. PROC. ANN. art. 44.01(a)(1); *see Alvarez*, 977 S.W.2d at 593 (reiterating that the State may appeal an order which "results in one of the enumerated situations within Art. 44.01(a),…regardless of what label is used to denominate the proceeding which results in the order being entered."); *see also State v. Chen*, 615 S.W.3d 376, 379 n.1 (Tex. App.—Houston [14th Dist.] 2020, no pet.) (explaining that the State could appeal an order granting Article 11.09 habeas corpus relief which dismissed an information, per Article 44.01(a)(1)). Consequently, even if this Court agrees with the Fourteenth Court of Appeals that the trial court's order granting Appellee's request for habeas corpus relief and discharging Appellee constituted a dismissal of the information, the State was nonetheless entitled to appeal that order pursuant to Article 44.01(a)(1). TEX. CODE CRIM. PROC. ANN. art. 44.01(a)(1); *see Alvarez*, 977 S.W.2d at 593 (holding that the State was entitled to appeal a habeas corpus order which dismissed municipal court complaints because the order triggered Article 44.01(a)(1)); *see also Chen*, 615 S.W.3d at 379 n.1.

This Court should sustain the State's sole ground for review.

PRAYER FOR RELIEF

The State respectfully asks this Court to grant this Petition for Discretionary Review, find that the State does have the right to appeal the trial court's order granting Article 11.09 habeas corpus relief, reverse the decision of the Fourteenth

Court of Appeals, remand the case to the Fourteenth Court of Appeals to consider the merits of the State's two points of error presented to that court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i), the undersigned attorney certifies that the number of words in the foregoing computer-generated document is 3,688, based upon the representation provided by the word processing program that was used to create the document, and excluding the portions of the document identified in Rule 9.4(i)(1).

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CERTIFICATE OF SERVICE

This is to certify that the undersigned counsel has directed the e-filing system eFile.TXCourts.gov to serve a true and correct copy of the foregoing document upon the following parties on March 15, 2021, at the following e-mail addresses, through the electronic service system provided by eFile.TXCourts.gov:

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APPENDIX

Opinion filed March 2, 2021, by Justice Jerry Zimmerer of the Fourteenth Court of Appeals; panel consisting of Justices Bourliot, Zimmerer, and Spain

State v. Garcia, No. 14-20-00548-CR, 2021 WL 786746 (Tex. App.—Houston [14th Dist.] Mar. 2, 2021, pet. filed).

Dismissed and Opinion filed March 2, 2021.

In The

Fourteenth Court of Appeals

NO. 14-20-00548-CR

THE STATE OF TEXAS, Appellant

V.

LEONARDO FABIO GARCIA, Appellee

On Appeal from the County Criminal Court at Law No. 8
Harris County, Texas
Trial Court Cause No. 2309523

OPINION

The dispositive issues in this appeal are (1) whether Code of Criminal Procedure article 44.01 authorizes the State to appeal the grant of relief to an applicant for a writ of habeas corpus filed pursuant to article 11.09 and if not, (2) whether a grant of relief to an applicant for a writ of habeas corpus under article 11.09 can be fairly characterized as an unfavorable ruling on a ruling from which the State would otherwise have the right to appeal. Tex. Code Crim. Proc. Ann. arts. 11.09, 44.01.

Appellee Leonardo Fabio Garcia, who is not a United States citizen, was convicted on a plea of guilty to the offense of misdemeanor theft on November 19, 1998. Appellee subsequently pleaded guilty to another misdemeanor theft charge in County Criminal Court at Law No. 8 on May 15, 2007. [1] The trial court assessed punishment at 10 days in the Harris County Jail with credit for three days' time served. Appellee did not appeal the 2007 conviction.

On November 26, 2019 appellee received notice from the United States Department of Homeland Security that he was subject to deportation as a result of his two prior misdemeanor theft convictions. *See* 8 U.S.C. § 1227(a)(2)(A)(ii) (providing for deportation of "[a]ny alien who at any time after admission is convicted of two or more crimes involving moral turpitude."). On May 1, 2020, appellee filed an application for writ of habeas corpus pursuant to article 11.09 of the Code of Criminal Procedure in which he alleged that his guilty plea was involuntary because he was not advised of the immigration consequences of his plea. After conducting a hearing the trial court granted habeas relief and vacated the judgment in the 2007 conviction. The State attempted to appeal the trial court's decision pursuant to article 44.01 of the Code of Criminal Procedure. Appellee challenges the State's right to appeal. For the reasons set forth below, we dismiss the State's appeal for want of jurisdiction.

JURISDICTION

As a reviewing court, we have the duty to make an initial determination of whether the court has jurisdiction to resolve the matter presented before it. *See State v. Roberts*, 940 S.W.2d 655, 657 (Tex. Crim. App. 1996), *overruled on other*

[1] Appellee raised involuntariness of both pleas in his application for writ of habeas corpus in the trial court. The 1998 conviction was not considered by the trial court because only the 2007 conviction was before the County Criminal Court at Law No. 8. In this opinion, we address the 2007 conviction.

grounds by State v. Medrano, 67 S.W.3d 892, 901–03 (Tex. Crim. App. 2002). The right to appeal is a right conferred and defined by statute. *See Marin v. State*, 851 S.W.2d 275, 278 (Tex. Crim. App. 1993). This is particularly important when the appealing party, the State, has a limited right of appeal. *See* Tex. Code Crim. Proc. Ann. art. 44.01 (setting forth when the State may appeal).

Ordinarily, a respondent in a habeas action, such as the State, cannot appeal. *Board of Pardons & Paroles ex rel. Keene v. Ct. of App. of Tx., Eighth Dist.*, 910 S.W.2d 481, 483 (Tex. Crim. App. 1995) (orig. proceeding); *In re Tex. Bd. of Pardons & Paroles*, 495 S.W.3d 554, 558 (Tex. App.—Houston [14th Dist.] 2016, orig. proceeding). As an exception to this general rule, article 44.01(k) grants the State the right to appeal an order granting relief to an applicant for writ of habeas corpus under article 11.072 of the Code of Criminal Procedure. *See* Tex. Code Crim. Proc. Ann. art. 44.01(k). Appellee in this case filed his application for writ of habeas corpus challenging his 2007 conviction under article 11.09 of the Code of Criminal Procedure.

Article 11.09 of the Code of Criminal Procedure allows a party confined on a misdemeanor charge to apply for habeas relief to "the county judge of the county in which the misdemeanor [was] charged to have been committed." Tex. Code Crim. Proc. Ann. art. 11.09. The Court of Criminal Appeals has held that the term "confined" in Article 11.09 does not require actual current confinement and that the county courts at law have habeas jurisdiction if a person is merely restrained due to the conviction. *Ex parte Schmidt*, 109 S.W.3d 480, 482–83 (Tex. Crim. App. 2003). This court has applied the confinement standard in the immigration context concluding that a trial court has jurisdiction over an article 11.09 habeas despite the fact that the immigrant was not then in the custody of the State of Texas because pending deportation was based solely on the immigrant's misdemeanor convictions.

Phuong Anh Thi Le v. State, 300 S.W.3d 324, 326 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

Appellee's habeas corpus application collaterally attacked appellee's two prior misdemeanor theft convictions: (1) appellee's order of deferred adjudication community supervision for Class B misdemeanor theft, dated November 19, 1998; and (2) appellee's final conviction for Class B misdemeanor theft by check, dated May 15, 2007. The portion of appellee's habeas corpus application that challenged his 1998 order of deferred adjudication challenged the viability of that conviction under articles 11.072 and 11.09 of the Code of Criminal Procedure. *See* Tex. Code Crim. Proc. Ann. art. 11.072 ("establish[ing] the procedures for an application for a writ of habeas corpus in a felony or misdemeanor case in which the applicant seeks relief from an order or a judgment of conviction ordering community supervision."); Tex. Code Crim. Proc. Ann. art. 11.09 (establishing the procedure for habeas corpus proceedings when "a person is confined on a charge of misdemeanor[.]"). The portion of appellee's habeas corpus application that challenged his 2007 conviction for theft by check, though, contested the viability of that conviction only under article 11.09 because appellee was sentenced to jail rather than receiving community supervision. *Compare* Tex. Code Crim. Proc. Ann. art. 11.072 with Tex. Code Crim. Proc. Ann. art. 11.09. The trial court's order granting relief and vacating the court's judgment of conviction and sentence in the 2007 conviction does so only under the trial court's authority under article 11.09.

Article 44.01 of the Code of Criminal Procedure provides the circumstances under which the State may appeal in a criminal case. *See* Tex. Code Crim. Proc. Ann. art. 44.01. Article 44.01(k) specifically entitles the State "to appeal an order granting relief to an applicant for a writ of habeas corpus under Article 11.072." But neither subsection (k), nor any other provision in Article 44.01, explicitly provides

the State the right to appeal an order granting relief to an applicant for a writ of habeas corpus filed under article 11.09. *See* Tex. Code Crim. Proc. Ann. art. 44.01. The State, however, may appeal an unfavorable ruling on an applicant's habeas corpus application when the State would otherwise have the right to appeal the order. *See e.g.*, *State v. Young*, 810 S.W.2d 221, 222–23 (Tex. Crim. App. 1991) (holding the appellate court had jurisdiction over the State's appeal of an order granting habeas corpus relief that had the effect of dismissing the indictments pending against the appellees because, under Article 44.01(a)(1), the State is entitled to appeal order that dismisses an indictment).

Here, the State asserts that the trial court's judgment granting habeas corpus relief and vacating the trial court's prior judgment "had the effect of granting a new trial," which the State may appeal pursuant to article 44.01(a)(3). In the alternative, the State asserts the trial court's order granting habeas corpus relief "was tantamount to an order granting a motion to arrest the trial court's judgment," which the State may appeal pursuant to article 44.01(a)(2). We address the State's assertions in turn.

I. Motion for New Trial

The State asserts that the trial court's grant of appellee's application in this case is equivalent to the grant of a new trial, and because the State has the right to appeal the grant of a new trial under article 44.01, the State may appeal the habeas ruling in this case. A new trial, contemplated by subsection (a)(3), is "the rehearing of a criminal action after the trial court has, on the defendant's motion, set aside a finding or verdict of guilt." Tex. R. App. P. 21.1(a); *see also State v. Evans*, 843 S.W.2d 576, 577 (Tex. Crim. App. 1992). In this case, however, the trial court did not grant a new trial. The court vacated the conviction and ordered "applicant discharged and released without delay."

Relying on *State v. Garcia*, No. 13-11-00689-CR, 2012 WL 7849303, at *3–

4 (Tex. App.—Corpus Christi-Edinburg Dec. 13, 2012, no pet.) (mem. op., not designated for publication), the State argues that the trial court's grant of relief pursuant to article 11.09 was the equivalent of the grant of a motion for new trial. Although we are not bound by an unpublished decision from another court of appeals, *see* Tex. R. App. P. 47.7(a), we address *Garcia* because the State relies on its holding for jurisdiction in this appeal.

In *Garcia*, the trial court granted habeas corpus relief because "it was unclear whether Garcia made his guilty plea knowingly." 2012 WL 7849303 at *4. Garcia, like appellee, in this case, was an undocumented immigrant subject to deportation due to a previous guilty plea to a misdemeanor drug offense. *Id.* at *1. Garcia filed an application for writ of habeas corpus pursuant to article 11.09 of the Code of Criminal Procedure in which he alleged ineffective assistance of counsel because his lawyer in the misdemeanor drug case failed to advise him of the possible immigration consequences of his guilty plea. *Id.* The trial court granted habeas relief finding that the facts of the case established doubt as to whether Garcia understood the consequences of his plea.[2] *Id.* at *4. The State appealed the grant of habeas corpus relief. *Id.* In addressing its jurisdiction over the State's appeal, the Thirteenth Court of Appeals held the trial court's ruling was the functional equivalent of the grant of a motion for new trial. *Id.* As such, the court held it had jurisdiction over the State's appeal. *Id.*

We decline the State's invitation to follow the Thirteenth Court's unpublished opinion in *Garcia* in this case. In *Garcia*, the court held, "Since the trial court order

[2] While not applicable to our jurisdictional analysis, we note that the appellee in *Garcia* pleaded guilty on September 7, 2010 after the United States Supreme Court decided *Padilla v. Kentucky*, 559 U.S. 356 (2010), which held that appellate counsel engages in ineffective assistance if they fail to advise a defendant of the immigration consequences of a guilty plea. *Id.* at 368–69. Appellee in today's case pleaded guilty in 2007 prior to the Court's decision in *Padilla*.

return[s] the case to the posture it had been in before the plea was accepted, the trial court order grant[s] a new trial, irrespective of the label or terms used in the motion or order." *Garcia*, 2012 WL 7849303, at *3 (quoting *Evans*, 843 S.W.2d at 577). Here, unlike the trial court in *Garcia*, the trial court did not make specific findings of fact, nor did the court's order grant a new trial. The trial court vacated the conviction and discharged appellee. The record does not reflect that the trial court ordered a rehearing in this case.

We do not agree that the trial court's order in this case may be appealed by the State as the functional equivalent of a motion for new trial. The Legislature specifically allows the State to appeal an order granting relief to an applicant for a writ of habeas corpus filed pursuant to article 11.072 of the Code of Criminal Procedure. *See* Tex. Code Crim. Proc. Ann. art. 44.01(k). It would be a simple enough matter for the Legislature to amend Article 44.01 to authorize the State to appeal the grant of relief to an applicant for a writ of habeas corpus filed pursuant to article 11.09, but the Legislature has not done so. The Legislature chose to single out grants of 11.072 habeas-corpus relief when granting the State the right to appeal. We are not allowed to rewrite the statute in the guise of judicial construction. *See* Tex. Const. article II, § 1; *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991).

II. Motion to Arrest Judgment

The State further contends that the trial court's order granting appellee habeas-corpus relief was the functional equivalent of a motion in arrest of judgment, the grant of which may be appealed by the State. *See* Tex. Code Crim. Proc. Ann. art. 44.01(a)(2). A motion in arrest of judgment is defined as a defendant's oral or written suggestion that, for reasons stated in the motion, the judgment rendered against the defendant was contrary to law. Tex. R. App. P. 22.1. A motion in arrest of judgment is essentially a post-trial motion to quash the indictment and must be based on the

"'face of the record'—the indictment, plea, verdict, and sentence." *State v. Savage*, 905 S.W.2d 268, 269 (Tex. App.—San Antonio 1994), *aff'd*, 933 S.W.2d 497 (Tex. Crim. App. 1996) (citing *United States v. Sisson*, 399 U.S. 267, 280–82 (1970)). It cannot be grounded on proof offered at trial. *Id*.

In this case, appellee's application for writ of habeas corpus alleged ineffective assistance because his attorney failed to advise him of the immigration consequences of his guilty plea. *See Padilla v. Kentucky*, 559 U.S. 356, 369–72 (2010). Appellee's claim of ineffective assistance of counsel required testimony from appellee and an affidavit from the attorney who represented appellee in the 2007 plea. Because appellee's claim of ineffective assistance of counsel was not based on the face of the record, appellee's application for writ of habeas corpus cannot be considered the equivalent of a motion in arrest of judgment. *See* Tex. R. App. P. 22.2; *Smith v. State*, 15 S.W.3d 294, 298 (Tex. App.—Dallas 2000, no pet.) citing *State v. Borden*, 787 S.W.2d 109, 110–11 (Tex. App.—Houston [14th Dist.] 1990, no pet.) ("[T]he rules governing the use of the motion in arrest of judgment have very serious restrictions.").

Because the trial court's grant of relief to an applicant for a writ of habeas corpus under article 11.09 cannot be fairly characterized as an unfavorable ruling on a ruling from which the State would otherwise have the right to appeal the order, article 44.01 does not authorize the State's appeal in this cause. We are without jurisdiction to consider the issues raised by the State.

CONCLUSION

Having determined that the State's appeal does not properly invoke the jurisdiction of the court, we dismiss the appeal for want of jurisdiction.

/s/ Jerry Zimmerer
Justice

Panel consists of Justices Bourliot, Zimmerer, and Spain.
Publish — Tex. R. App. P. 47.2(b).

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